

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

In the Matter of

DETERMINATION OF RATES AND  
TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(PHONORECORDS IV)

Docket No. 21-CRB-0001-PR (2023–2027)

**WRITTEN DIRECT STATEMENT OF APPLE INC.**  
**(PUBLIC VERSION)**

**Volume 1: Introductory Memorandum,  
Proposed Rates and Terms, & Confidentiality Declaration**

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**INTRODUCTORY MEMORANDUM TO THE WRITTEN DIRECT STATEMENT OF  
APPLE INC.**

Pursuant to 17 U.S.C. § 803(b)(6)(C) and 37 C.F.R. § 351.4, Apple Inc. (“Apple”) hereby submits this Introductory Memorandum in support of its Written Direct Statement to the Copyright Royalty Judges in the above-captioned proceeding.

**I. SUMMARY OF POSITION**

Over the past five years, one of the biggest stories in the music industry has been the tremendous growth in revenue for copyright owners due, in large part, to interactive streaming. As MIDiA Research reports, publisher revenues grew from \$2.65 billion in 2016 to \$3.7 billion in 2019, an increase of 40%. **APL-007**. Venture capital firms have taken notice, with music publishing rights selling for hundreds of millions of dollars due to the growth in streaming royalties. **APL-017–018**. Meanwhile, interactive streaming services, like Apple Music, which bear the financial burden and risk of offering such services,

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For the sake of the industry, this proceeding must make sure all of the participants in the music ecosystem benefit from the healthy growth in interactive streaming in a fair and balanced

way. The royalty rates and terms should encourage creators to create *and* services to innovate to connect songs with music fans and continue to drive paid consumption of music in a diversified and competitive market that serves a wide range of consumers. To that end, Apple proposes a simple rate structure that brings what has worked in the past into the present, is fair and transparent to everyone in the ecosystem, is cost-effective to implement, and aligns incentives toward continued growth. The proposal also satisfies the new willing buyer, willing seller (“WBWS”) standard, under which royalties must be set at a level that would have been negotiated in the marketplace between a willing buyer and willing seller, taking into account the substitutional and/or promotional effects of the licensee’s service as well as the relative roles of the copyright owner and licensee in making the work available. 17 U.S.C. § 115(c)(1)(F)(i)-(ii).

#### **A. Apple’s Proposal**

Apple proposes that, for all offerings, services pay the greater of (a) an all-in percentage of revenue less performance royalties, and (b) a per-subscriber or per-active user minimum or mechanical floor, tiered to support a variety of services and continued market segmentation.<sup>1</sup> The only exception is hardware bundles (i.e., bundles in which a music service is bundled with complementary hardware), where the rate would be a fixed mechanical floor of 33 cents per subscriber, with no revenue prong, for two years. This is to address the challenges associated with allocating revenue to the music service in a hardware bundle, discussed more below.

With respect to the headline percentage of revenue rate, Apple understands that the Judges are considering the appropriate headline rate during the *Phonorecords III* remand

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<sup>1</sup> For the sake of simplicity, and in recognition of the fact that the Judges chose to maintain the use of mechanical floors in *Phonorecords III*, Apple proposes rolling forward the mechanical floors from *Phonorecords II* for standalone services, as well as new floors for other services that did not have all-in minima or mechanical floors in *Phonorecords II*. For Limited Offerings and Paid Locker Services, it proposes retaining the all-in minima from *Phonorecords II*. Apple, however, equally supports the adoption of reasonable all-in minima for all services.

proceeding. Apple proposes adopting the headline rate the Judges decide in the *Phonorecords III* remand in this proceeding, provided the rate is reasonable under the WBWS standard.<sup>2</sup>

Apple's proposed rate structure is based on its previously negotiated direct deals with publishers, which offer a simplified structure to *Phonorecords II* (and *Phonorecords III*), while retaining the existing all-in percent of revenue rate structure and mechanical and all-in floors from *Phonorecords II* (and, likely, *Phonorecords III*). The key aspects of Apple's proposal are discussed below.

First, Apple's proposal streamlines the rate structure from *Phonorecords II* (and the proposals in the *Phonorecords III* remand) and conforms it with the WBWS standard by eliminating the total content cost prong ("TCC"). Under TCC, interactive streaming services pay publishers mechanical royalties calculated as a percentage of what interactive streaming services pay to labels. This tying, however, is neither economically justifiable nor compliant with the WBWS standard in this proceeding. This rate-setting proceeding provides publishers with the opportunity to establish appropriate rates for the rights they control using the WBWS standard. The TCC overrides all the careful work of this tribunal by importing rates from an entirely different set of negotiations with an entirely different set of rights holders into the proceeding. This is inappropriate under a WBWS standard, which is supposed to look at negotiations between the owners of the mechanical right and licensees. The TCC also introduces into the Section 115 regime the complementary oligopoly power of the three major labels, Sony Music Entertainment, Universal Music Group, and Warner Music Group (the "Majors"), which was

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<sup>2</sup> The one exception is paid music lockers, for which Apple proposes retaining the 12% headline rate from *Phonorecords II*.

well-documented in the *Webcaster* proceedings. This too is inappropriate from a WBWS perspective. *See Web IV*, at 40 (applying WBWS standard and finding that “it is precisely this complementary oligopoly value that the Judges are declining to include in the statutory rate”).

The TCC is not only bad policy and in contravention of the WBWS standard, but it also presents a double bind to the services: when one of their principal cost inputs increases, the other principal cost input increases in tandem, with no corollary increase in consumer demand. This leaves the services no choice but to take both cost increases out of their own, **RESTRICTED**, margins. The issue is even worse for new market entrants. Apple understands and has experienced that to **RESTRICTED**

**RESTRICTED** Therefore, these new services are subject to not only higher label costs relative to their competitors, but under the TCC prong, higher publisher costs as well. A similar disparity arises for services large and small if labels favor one service with lower effective royalty rates over another.

*Second*, Apple’s proposal maintains the all-in rate structure from *Phonorecords II*. This is critical because interactive streaming services must pay publishers (directly and/or via PROs) both mechanical and performance royalties for interactive streaming. Being able to subtract performance royalties helps maintain publishing costs at a reasonable level. This is particularly important as PROs not subject to consent decrees, like SESAC and GMR, **RESTRICTED** **RESTRICTED**, even though they control only a tiny fraction of the catalog available on Apple Music.

*Third*, Apple believes that copyright owners should be guaranteed a minimum value for the use of their works, and have protection against revenue deferral by services. Under

*Phonorecords II* (and the proposed *Phonorecords III* rates), however, per subscriber mechanical floors and/or all-in minima apply only to certain types of interactive streaming services. To promote consistency and offset the elimination of TCC as a backstop mechanism, Apple proposes expanding the tiered mechanical floor system from *Phonorecords II* (and the *Phonorecords III* remand proposals), so all service types have either a mechanical floor or an all-in minimum. In addition, because a diverse array of service offerings helps to segment the market and expand the subscriber funnel, thus attracting consumers with a wide variety of willingness-to-pay to subscription streaming, Apple also proposes a new limited offering service category for full-catalog services with substantially limited functionality as compared to premium services. This category would have a lower mechanical floor than premium subscription services (25 cents rather than 50 cents), to reflect the reduced functionality.

*Fourth*, Apple proposes adopting discounts for family and student plans, just like those adopted in *Phonorecords III* and approved by the D.C. Circuit. *See Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 393 (D.C. Cir. 2020). Under this proposal, each family plan would count as 1.5 subscribers for purposes of calculating the mechanical minimum, and each student plan would equal 0.5 subscribers for purposes of calculating the mechanical minimum. Apple also proposes adding a 50% discount on mechanical floors during the second and third month of free trial plans. Discounts, such as student plans, help convert consumers to paid services and encourage paid streaming among low willingness-to-pay consumers, who otherwise might not be able to experience music at all or might resort to piracy as was prevalent in the pre-iTunes days. Appropriate discounts allow services to segment the market and funnel consumers to paid streaming, which benefits the copyright owners with increased royalty revenues.

Finally, Apple proposes two key modifications to the *Phonorecords II* rates for bundles, to address concerns previously raised by both copyright owners and services. In *Phonorecords III*, publishers expressed a concern that services were using bundles to hide or underreport revenue. On the other hand, if services have to pay full royalties for bundled offerings (as if they were not offering a bundle at all), there would be a disincentive to offering bundles, which acquire customers who may not otherwise be interested in paying for music and aid in customer retention. The reality of the broader digital entertainment market is that as sources of entertainment proliferate, bundles have become a common tool to encourage consumers to experience different types of content and overcome price sensitivities. If music services cannot compete in this marketplace with bundles, they may well be left behind. To address these concerns, Apple proposes two compromise positions, one for bundles consisting of multiple services (e.g., a music service coupled with a video service), which Apple refers to in the regulations as “Bundled Subscription Offerings,”<sup>3</sup> and another for bundles combining a music streaming service with complementary hardware, which Apple calls “Hardware Bundles.”

With respect to Bundled Subscription Offerings (i.e., bundles consisting of multiple music and non-music services), Apple proposes that royalties be discounted based on the proportional value of the standalone price of the components of the bundle. By way of example, if the bundle is priced to consumers at a 20% discount compared to the standalone price of the various components of the bundle, then royalties will be reduced 20% as well. Because these types of service bundles typically have a monthly fee, tracking revenue for purposes of the calculation is fairly straightforward.

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<sup>3</sup> Apple has modified this definition from prior iterations to apply to service bundles only, and created a separate definition for bundles in which a music offering is combined with products, called a “Hardware Bundle.”

With respect to Hardware Bundles (i.e., bundles in which a music streaming service is sold as a bundle with hardware), on the other hand, it is more difficult to properly allocate revenue to use of the music service over time because the consumer typically pays a one-time, lump sum fee for the bundle. To allow services to offer the bundle pricing the market demands, while still ensuring rights holders are appropriately compensated for the full period of music use, Apple proposes a fixed monthly mechanical minimum of 33 cents per active user with no revenue prong for up to two years per subscription plan, after which the royalty for the standalone service shall apply. This number [REDACTED] [REDACTED]

Through this balanced approach, Apple intends for the copyright owners and services to share in the costs and benefits of providing bundles, with neither side getting a windfall specific to the bundle offering, but both benefiting from the customer acquisition and retention functions that bundle offerings have.

## **B. Benchmarks**

Consistent with the WBWS standard, Apple uses its direct licensing deals with publishers and PROs, coupled with the *Phonorecords II* settlement (particularly for purposes of determining appropriate mechanical minima for the various service offerings and establishing an all-in rate structure centered around a percentage of revenue rate), as benchmarks. In addition, Apple uses its deals with labels to highlight the appropriateness of various aspects of its proposal, such as a [REDACTED]

[REDACTED]

Before the implementation of the Music Modernization Act, Apple paid royalties pursuant to direct deals with publishers. It entered into directly negotiated agreements for mechanical licenses for interactive streaming with publishers including the “big three”, Sony

Music Publishing, Warner Chappell, and UMPG, as well as prominent indie publishers, like Kobalt and BMG Rights Management (the “Publisher Agreements”). **RESTRICTED**

**RESTRICTED** Therefore, these are (a) recent agreements, (b) between the same parties to this proceeding, (c) for the same right as at issue in this proceeding, and (d) for the same types of services as in this proceeding. Notably, **RESTRICTED** these agreements do more than merely cite back to the statutory rate. This indicates that they were actually negotiated as opposed to simply applying the *Phonorecords II* standard. These Publisher Agreements contain a version of all of the key aspects of Apple’s proposal.

- Under all of these Publisher Agreements, **RESTRICTED**  
**RESTRICTED**
- All of these Publisher Agreements contain **RESTRICTED**  
**RESTRICTED**
- All of these Publisher Agreements contain a **RESTRICTED**  
**RESTRICTED** to strengthen the trust of the creative community.
- Several of these Publisher Agreements contain a provision under which **RESTRICTED**  
**RESTRICTED**
- Several of these Publisher Agreements contain **RESTRICTED**  
**RESTRICTED** In Apple’s direct Publisher Agreements, the

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Apple's direct deals with the PROs, ASCAP, BMI, SESAC, and GMR (the "PRO Agreements"), for the performance right—a perfect complement to the mechanical right and owned by the same parties, namely, publishers and/or songwriters—are also instructive.

- Under the ASCAP, BMI, and SESAC agreements, RESTRICTED
- The ASCAP, BMI, and SESAC agreements contain RESTRICTED
- The PRO Agreements contain a RESTRICTED
- The ASCAP and BMI agreements RESTRICTED
- Apple's agreements with ASCAP, BMI, and SESAC are RESTRICTED

Finally, while Apple's agreements with labels are inappropriate benchmarks with respect to the rates at issue in this proceeding, they nonetheless provide guidance as to whether a reasonable copyright holder would enter into the rate structure and discounts Apple proposes.

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<sup>4</sup> As explained in the testimony from Apple's Global Senior Director of Music Publishing, RESTRICTED  
Therefore, in general, Apple proposes using *Phonorecords II* as the benchmark for what minima should be.

<sup>5</sup> RESTRICTED

Label agreements confirm that copyright owners negotiating in the real world would agree [REDACTED].

[REDACTED] RESTRICTED [REDACTED]

- [REDACTED] RESTRICTED [REDACTED]
- [REDACTED] RESTRICTED [REDACTED]
- [REDACTED] RESTRICTED [REDACTED]
- [REDACTED] RESTRICTED [REDACTED]
- [REDACTED] RESTRICTED [REDACTED]

## II. SUMMARY OF WRITTEN TESTIMONY

### A. Fact Witness: Elena Segal

Elena Segal has worked for Apple in connection with music licensing matters for over 20 years. She is currently the Global Senior Director of Music Publishing at Apple, a position she has held for two years. Her testimony focuses on four main points.

*First*, she provides information about Apple Music's impact on, and contributions to, the music industry. These include (a) contributing to a growth in royalties paid to publishers and songwriters over the last five years; (b) attracting consumers from various market segments through innovative offerings to help drive growth in the industry; (c) creating music discovery tools, such as personalized playlists, that help introduce new artists and songs to consumers; and (d) developing technological and product innovations, such as spatial audio, to improve the quality of the music listening and discovery experience. This testimony shows that Apple Music

has benefited copyright owners both financially and as a compelling way to connect songs with music fans.

*Second*, she provides information about the costs of operating Apple Music, including royalty costs. As she explains, despite growing revenue, **RESTRICTED**.

One of the main reasons for this is high, unpredictable royalty costs. Specifically, although Apple Music takes on the entire risk of operating an interactive streaming service, rights holders receive more than **RESTRICTED** of the revenue from the service, approximately **RESTRICTED** of which goes to labels for music streams and **RESTRICTED** of which goes to publishers and PROs (that then pass royalties onto publishers and songwriters) for mechanical and performance rights as of 2021. (Apple also pays copyright owners for other Apple Music content, like lyrics and videos.) And of course, Apple has other costs on top of royalty costs, including the development of music discovery tools and features that enhance the listening experience, marketing of music and the service, and technological innovation, all of which benefit copyright owners by attracting customers to paid music streaming. Ms. Segal explains that, because of these margins, **RESTRICTED**

**RESTRICTED**

*Third*, she discusses Apple's negotiations with the three major labels and its direct deals with these labels for playing sound recordings on Apple Music. As she explains, the three Majors have substantial market power because each of their catalogs are "must haves." A premium service cannot operate without the music from one of these catalogs because consumers will simply switch to a different service if they cannot find the music they want on Apple Music. As a result, labels can demand **RESTRICTED**

**RESTRICTED**

*Fourth*, she explains Apple’s proposal and why it makes sense. Among other things, she explains that (a) the TCC prong violates the WBWS standard and links publisher rates to label market power, endangering the competitive market and making it very difficult for services to manage their principal sources of costs; (b) tiered mechanical floors, including an additional tier for full catalog services with limited functionality, help protect copyright owners against revenue deferral, while at the same time allowing a variety of services to compete in the market; (c) adjustments to mechanical floors for student plans, family plans, and trial plans enable services to offer these options, which are designed to help increase total royalties; (d) all-in rates help control total royalties owed to publishers and PROs by setting a number that serves as a reference point for negotiations regarding performance royalties; and (e) allocating bundle payments for service bundles by the proportional value of the services is a fair balance for services and copyright owners.

*Finally*, **RESTRICTED**

**B. Expert Witness: Dr. Stephen Prowse**

Dr. Stephen Prowse is the Senior Managing Director in the Forensic and Litigation Services Practice at FTI Consulting, Inc. (“FTI”). Before joining FTI, he was a Principal (Partner) in the Dallas office of the Forensic Practice at KPMG LLP and a Director at PricewaterhouseCoopers LLP. Prior to his consulting career, he was employed by the Federal Reserve Bank of Dallas as a Senior Economist and Policy Advisor (1994-1998), and by the Board of Governors of the Federal Reserve System in Washington DC (1989-1994) as an Economist. Dr. Prowse has served as an expert witness in hundreds of cases. His work has

included determining royalty rates and other terms for licensing agreements, damages calculations in intellectual property matters, pricing studies to evaluate whether alleged antitrust violations resulted in increased prices to consumers, estimating price elasticities of demand and supply using econometric and statistical methods, and analyzing markets in competitive, monopolistic and oligopolistic environments.

Dr. Prowse received his B.A. in economics from Cambridge University, Cambridge, England, in 1982; his M.S. in economics from the California Institute of Technology in 1984; and his Ph.D. in economics from the University of California at Los Angeles in 1989. He is also a CFA Charterholder and a member of the Licensing Executives Society. He served as an Adjunct Professor at the Cox School of Business, Southern Methodist University (1998), where he taught economics and finance, and currently serves as a guest lecturer in these subjects.

Dr. Prowse first provides testimony about the music streaming industry as a whole, including the various rights holders, royalty income streams, and growth in the industry. He concludes that the music industry is very healthy and has experienced significant growth as a result of interactive streaming.

Dr. Prowse next examines the *Phonorecords II* settlement and the various payment structures and prongs in that settlement. He further explains that *Phonorecords II* can be used as a reasonable starting point for considering the appropriate rate and rate structure in this proceeding, but that it must be examined carefully for inconsistencies with the WBWS standard.

Dr. Prowse then focuses his analysis on TCC. He explains the economic impact of oligopoly power like that the Majors possess and explains why TCC is inconsistent with the WBWS standard. He concludes that a percentage of revenue structure without TCC is more

consistent with the WBWS standard, as it does not link publisher royalty rates to label market power.

Dr. Prowse next discusses the economic concepts of revenue deferral and concludes that a per-subscriber or per-active user minimum (either all-in or mechanical-only) serves the goal of protecting copyright owners from revenue deferral. He explains that *Phonorecords II* is an appropriate starting place for determining what those minima should be. He also explains why, from an economic perspective, various discounts and tiers for the minima are appropriate for accessing low willingness-to-pay consumers.

Finally, Dr. Prowse discusses challenges to calculating bundled revenue and determines that Apple's proposal reflects a reasonable position for calculating bundled revenue that satisfies the WBWS standard.

Throughout his report, Dr. Prowse highlights various agreements that serve as benchmarks in this proceeding. He concludes that these various agreements confirm that Apple's proposal is consistent with a WBWS standard.

Dated: October 13, 2021

Respectfully submitted,

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## **Subpart A--Regulations of General Application**

### **1. § 385.1 General.**

(a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of [17 U.S.C. 115](#). This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) **Legal compliance.** Licensees relying on the compulsory license detailed in [17 U.S.C. 115](#) shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to [17 U.S.C. 115](#) is obtained. Neither the part nor the act of obtaining a license under [17 U.S.C. 115](#) is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to [17 U.S.C. 115](#).

(d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply *in lieu* of the rates and terms of this part.

### **2. § 385.2 Definitions.**

*For the purposes of this part, the following definitions apply:*

**Accounting Period** means the monthly period specified in [17 U.S.C. 115\(c\)\(2\)\(I\)](#) and in [17 U.S.C. 115\(d\)\(4\)\(A\)\(i\)](#), and any related regulations, as applicable.

**Active Subscriber** means an End User of a Standalone Free Nonsubscription/Ad-Supported Service, Bundled Subscription Offering, or Hardware Bundle, in each case who has made at least one Play during the Accounting Period.

**Active Family Bundle** means a Family Bundle with one or more family members that have made at least one Play during the Accounting Period. An Active Family Bundle equals 1.5 Active Subscribers, regardless of how many family members make a Play during the Accounting Period.

**Affiliate** means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

***Bundled Subscription Offering*** means an Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other services (including services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the service(s) with which it is made available (e.g., a case in which an End User can buy a subscription for access to a television streaming service, fitness service, and Licensed Activity for a single price).

***Copyright Owner(s)*** are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under [17 U.S.C. 115](#).

***Digital Phonorecord Delivery*** has the same meaning as in [17 U.S.C. 115\(e\)\(10\)](#).

***Eligible Interactive Stream*** means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under [17 U.S.C. 114\(d\)\(1\)](#) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under [17 U.S.C. 114\(d\)\(2\)](#).

***Eligible Limited Download*** means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under [17 U.S.C. 115\(c\)\(3\)\(C\)](#) and [\(D\)](#) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for

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(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

***Eligible Work Allocation*** means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Licensed Activity and the denominator of which is the sum of the number of Plays arising from Licensed Activity and the number of Plays of Non-Eligible Works.

***End User*** means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

**Subscriber** means a unique person that pays a subscription fee for an Offering during the relevant Accounting Period.

**Family Plan** means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

**Family Bundle** refers to a Bundled Subscription Offering or Hardware Bundle shared by two or more family members for a single bundle price.

**Free Trial Offering** means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when:

- (1) Neither the Service Provider, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering beyond nominal amounts (e.g., \$0.99 per month);
- (2) The free usage is limited to the following time periods:
  - (a) 30 consecutive days per subscriber per one-year period;
  - (b) two consecutive months per subscriber per two-year period; or
  - (c) three consecutive months per subscriber per three-year period;
- (3) The Free Trial Offering is made available to the End User for no more than a nominal amount; and
- (4) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider, or the free usage automatically converts to a non-free Offering of the Service Provider at the end of the free usage period.

**Full-Catalog Limited Offering** means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which the features or functionality by which the End User can listen to sound recordings are substantially limited relative to Subscription Offerings in the marketplace providing unlimited features or functionality (e.g., a product with substantially limited capability to access recordings on-demand), but with a comprehensive catalog of sound recordings.

**GAAP** means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

**Hardware Bundle** means a Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users

with one or more other products capable of rendering audio playback comprising Licensed Activity as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) with which it is made available (*e.g.*, a case in which an End User can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price). Royalties shall be calculated on a “Hardware Bundle” basis for two years only, after which the royalty that would apply to the Offering if sold on a standalone basis shall apply.

**Licensee** means any entity availing itself of the compulsory license under [17 U.S.C. 115](#) to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

**Licensed Activity**, as the term is used in [subparts C and D of this part](#), means covered activity, under voluntary or statutory license, *via* Digital Phonorecord Deliveries in the form of Eligible Interactive Streams, Eligible Limited Downloads, and Restricted Downloads.

**Limited Offering** means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which –

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.*, a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

**Locker Service** means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

**Mixed Service Bundle** means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (*e.g.*, internet access service, mobile phone service) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

**Music Bundle** means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (*e.g.*, download plus ringtone, CD plus

downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

***Net Advertising Revenues*** means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes, and any carriage or in-app commission fees (such carriage or in-app commission fees subject to a cap equal to 30% of the retail price excluding taxes). Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.” Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

***Net Subscription Revenues*** means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions (such carriage or in-app commission fees subject to a cap equal to 30%, and other fees payable to distribution partners subject to a cap equal to 10%, in each case of the retail price excluding taxes). Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

***Non-Eligible Work*** means a sound recording (including audiovisual recordings) embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, or for which the reproduction and distribution rights have been obtained other than pursuant to the license granted under 17 U.S.C. 115, or for which no reproduction or distribution license is necessary under the Copyright Act, in each instance as included as part of

an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

***Offering*** means a Service Provider's engagement in Licensed Activity covered by [subparts C and D of this part](#).

***Paid Locker Service*** means a Locker Service for which the End User pays a fee to the Service Provider.

***Performance Royalty*** means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

***Permanent Download*** has the same meaning as in [17 U.S.C. 115\(e\)\(24\)](#).

***Play*** means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user, or is otherwise reasonably determined by Licensee via reproducible methodology to be fraudulent. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

***Promotional Offering*** means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

- (1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;
- (3) For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of [17 U.S.C. 106\(2\)](#) or [115\(a\)\(2\)](#);
- (4) The Promotional Offering is made available to an End User free of any charge; and
- (5) The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

***Purchased Content Locker Service*** means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or -

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

(2) [Reserved]

***Relevant Page*** means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.*, an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

***Restricted Download*** means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

***Ringtone*** means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

***Service Provider*** means that entity governed by [subparts C](#) and [D of this part](#), which might or might not be the Licensee, that with respect to the section 115 license

- (1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;
- (2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and
- (3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

***Service Provider Revenue*** means, for each Offering, and for each Accounting Period, the sum of Net Advertising Revenues, if any, and Net Subscription Revenues, if any.

***Sound Recording Company*** means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under [chapter 14 of title 17, United States Code](#), that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

***Standalone Non-Portable Subscription Offering—Streaming Only*** means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

***Standalone Non-Portable Subscription Offering—Mixed*** means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

***Standalone Portable Subscription Offering*** means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, not including Limited Offerings or Full-Catalog Limited Offerings.

***Standalone Free Nonsubscription/Ad-Supported Service*** means an Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads free of any charge to the End User, not including Free Trials. ***Stream*** means the digital transmission of a sound recording of a musical work to an End User -

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and
- (3) That is subject to licensing as a public performance of the musical work.

***Streaming Cache Reproduction*** means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

***Student Plan*** means a discounted Subscription Offering available on a limited basis to students.

***Subscription Offering*** means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a bundle with one or more other products or services.

### 3.    **§ 385.3 Late payments.**

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in [17 U.S.C. 115\(c\)\(2\)\(I\)](#) or [115\(d\)\(4\)\(A\)\(i\)](#), as applicable and detailed in [part 210 of this title](#). Late fees shall accrue from the due date until the Copyright Owner receives payment.

**Subpart B - Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles**

**4. § 385.10 Scope.**

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, Permanent Downloads, Ringtones, and Music Bundles, in accordance with the provisions of [17 U.S.C. 115](#).

**5. § 385.11 Royalty rates.**

(a) ***Physical phonorecord deliveries and Permanent Downloads.*** For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) ***Ringtones.*** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) ***Music Bundles.*** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under [paragraph \(a\)](#) or [\(b\)](#) of this section, as appropriate.

**Subpart C - Eligible Interactive Streaming, Eligible Limited Downloads, Full-Catalog Limited Offerings, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Hardware Bundles, Locker Services, and Other Delivery Configurations**

**6. § 385.20 Scope.**

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works provided through subscription and nonsubscription digital music Service Providers, including Limited Offerings, Full-Catalog Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Hardware Bundles, Paid Locker Services, and Purchased Content Locker Services in accordance with the provisions of [17 U.S.C. 115](#), exclusive of Offerings subject to [subpart D of this part](#).

**7. § 385.21 Royalty rates and calculations.**

(a) ***Applicable royalty.*** Licensees that engage in Licensed Activity covered by this subpart pursuant to [17 U.S.C. 115](#) shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in subsection (b) of this subpart, provided, however, that Promotional Offerings, Free Trial Offerings, and Certain

Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part.

(b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this [paragraph \(b\)](#) of this section. If a Service Provider includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue and expenses associated with each Offering. For purposes of calculating rates pursuant to this § 385.21, (i) a Family Plan shall be treated as 1.5 Subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month, (ii) a Student Plan shall be treated as 0.50 Subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month, and (iii) an Active Family Bundle shall be treated as 1.5 Active Subscribers per month, prorated in the case of a Family Bundle in effect for only part of a calendar month.

(1) **Step 1: Calculate the All-In Royalty for the Offering.** For each Accounting Period, the all-in royalty for each Offering in this subpart (other than Hardware Bundles and Plays subject to subpart D) shall be a headline percent of revenue rate multiplied by Service Provider Revenue. For Paid Locker Services and Purchased Content Locker Services the headline rate shall be 12%.<sup>1</sup>

(2) **Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in [paragraph \(b\)\(1\)](#) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of *bona fide* technical limitations as described in step 3 in [paragraph \(b\)\(3\)](#) of this section, using the same alternative methodology as provided in step 4.

(3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service

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<sup>1</sup> For other Offerings, Apple understands the Judges are considering the appropriate headline rate during the *Phono III* remand proceeding. Apple proposes adopting that same number here as well, provided it is reasonable under the willing buyer/willing seller standard.

Provider by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of:

- (i) The result determined in step 2 in [paragraph \(b\)\(2\)](#) of this section; and
- (ii) The royalty floor (if any) set forth in the following table, subject to any adjustments for Family Plans, Student Plans, Active Family Bundles, and Free Trial Offerings. For Offerings subject to an all-in, rather than mechanical, floor, performance royalties should be subtracted from the all-in per-Subscriber pool using the methodology in Step 2 prior to doing this Step 3 determination.

<b>Offering</b>	<b>Mechanical Royalty Floor</b>	<b>All-In Royalty Floor</b>
Standalone Non-Portable Subscription Offering - Streaming Only	15 cents per Subscriber per month	NA
Standalone Non-Portable Subscription Offering - Mixed	30 cents per Subscriber per month	NA
Standalone Portable Subscription Offering	50 cents per Subscriber per month	NA
Limited Offerings	NA	18 cents per Subscriber per month
Full-Catalog Limited Offering	25 cents per Subscriber	NA
Standalone Free Nonsubscription/Ad Supported Services	The royalty floor that would apply to the Offering if it were a Subscription Offering for each Active Subscriber during the month, reduced by the percentage of total listening hours of the applicable Offering comprising advertising during the applicable Accounting Period	NA
Bundled Subscription Offering	The royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis for each Active Subscriber during the month	NA
Hardware Bundles	33 cents per Active Subscriber	
Paid Locker Service	NA	17 cents per Subscriber per month

**Computation of royalty floors.** For purposes of this [paragraph \(b\)\(3\)](#), to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for

only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to a zero royalty rate pursuant to [subpart D of this part](#), except in the case of a Bundled Subscription Offering or Hardware Bundle, where subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in [paragraph \(b\)\(3\)](#) of this section (subject to paragraphs (i) and (ii) of this paragraph) must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to [subpart D of this part](#)) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to [subpart D of this part](#)) through the Offering during the Accounting Period.

Prior to conducting the allocation described in this Step 4,

(i) for all Offerings, the payable royalty pool shall be multiplied by the Eligible Work Allocation, and

(ii) for Bundled Subscription Offerings only, after conducting the calculation described in paragraph (i) above, the payable royalty pool shall be multiplied by the proportional value of the Offering based on the stand-alone retail price of each product or services in the bundle. For example, if a Service Provider sells the Offering on a stand-alone basis for \$10.00/month and a separate service on a stand-alone basis for \$5.00/month, but sells the Offering and other service together as part of a bundle for \$12.00/month, then the payable royalty pool shall be multiplied by 80%.

For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in [paragraph \(c\)](#) of this section. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) **Overtime adjustment.** For purposes of the calculations in step 4 in this [paragraph \(b\)\(4\)](#) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

- (1) 5:01 to 6:00 minutes - Each Play = 1.2 Plays.
- (2) 6:01 to 7:00 minutes - Each Play = 1.4 Plays.
- (3) 7:01 to 8:00 minutes - Each Play = 1.6 Plays.
- (4) 8:01 to 9:00 minutes - Each Play = 1.8 Plays.
- (5) 9:01 to 10:00 minutes - Each Play = 2.0 Plays.
- (6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(c) **Accounting.** The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

#### **Subpart D - Promotional and Free-to-the-User Offerings**

### **8. § 385.30 Scope.**

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of [17 U.S.C. 115](#).

### **9. § 385.31 Royalty rates.**

(a) **Promotional Offerings.** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) **Free Trial Offerings.**

(1) For Free Trial Offerings, the royalty rate is zero for the first 30 days;

(2) During the second and third month of any Free Trial Offering, the minima identified in Subpart C, Section (b)(3)(ii) shall be reduced by 50%.

(c) **Certain Purchased Content Locker Services.** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(d) **Unauthorized use.** If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart

differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

## **Subpart A--Regulations of General Application**

### **1. § 385.1 General.**

(a) **Scope.** This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of [17 U.S.C. 115](#). This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) **Legal compliance.** Licensees relying on the compulsory license detailed in [17 U.S.C. 115](#) shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) **Interpretation.** This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to [17 U.S.C. 115](#) is obtained. Neither the part nor the act of obtaining a license under [17 U.S.C. 115](#) is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to [17 U.S.C. 115](#).

(d) **Relationship to voluntary agreements.** The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply *in lieu* of the rates and terms of this part.

### **2. § 385.2 Definitions.**

*For the purposes of this part, the following definitions apply:*

**Accounting Period** means the monthly period specified in [17 U.S.C. 115\(c\)\(2\)\(I\)](#) and in [17 U.S.C. 115\(d\)\(4\)\(A\)\(i\)](#), and any related regulations, as applicable.

**Active Subscriber** means an End User of a [Standalone Free Nonsubscription/Ad-Supported Service](#), Bundled Subscription Offering, [or Hardware Bundle, in each case](#) who has made at least one Play during the Accounting Period.

**Active Family Bundle** means a Family Bundle with one or more family members that have made at least one Play during the Accounting Period. An Active Family Bundle equals 1.5 Active Subscribers, regardless of how many family members make a Play during the Accounting Period.

**Affiliate** means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

\* Redline prepared against Services' proposal in Phonorecords III remand proceedings.

**Bundled Subscription Offering** means ~~a~~an Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other ~~products or~~ services (including ~~products or~~ services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the ~~product(s) or~~ service(s) with which it is made available (e.g., a case in which an End User can buy a ~~portable device and one year access to a~~ subscription for access to a television streaming service ~~providing~~, fitness service, and Licensed Activity for a single price).

**Copyright Owner(s)** are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under [17 U.S.C. 115](#).

**Digital Phonorecord Delivery** has the same meaning as in [17 U.S.C. 115\(e\)\(10\)](#).

**Eligible Interactive Stream** means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under [17 U.S.C. 114\(d\)\(1\)](#) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under [17 U.S.C. 114\(d\)\(2\)](#).

**Eligible Limited Download** means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under [17 U.S.C. 115\(c\)\(3\)\(C\)](#) and [\(D\)](#) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

**Eligible Work Allocation** means, with respect to each Accounting Period, a fraction, the numerator of which is the number of Plays arising from Licensed Activity and the denominator of which is the sum of the number of Plays arising from Licensed Activity and the number of Plays of Non-Eligible Works.

**End User** means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

**Subscriber** means a unique person that pays a subscription fee for an Offering during the relevant Accounting Period.

**Family Plan** means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

**Family Bundle** refers to a Bundled Subscription Offering or Hardware Bundle shared by two or more family members for a single bundle price.

**Free Trial Offering** means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when:

(1) Neither the Service Provider, ~~the Sound Recording Company~~, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering; beyond nominal amounts (e.g., \$0.99 per month);

(2) The free usage ~~does not exceed~~ is limited to the following time periods:

(a) 30 consecutive days per subscriber per ~~two~~one-year period;

~~(3) — In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;~~

~~(4) — Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;~~

~~(5) —~~ (b) two consecutive months per subscriber per two-year period; or

(c) three consecutive months per subscriber per three-year period;

(3) The Free Trial Offering is made available to the End User ~~free of any charge~~for no more than a nominal amount; and

~~(6) —~~ 4) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider; or the free usage automatically converts to a non-free Offering of the Service Provider at the end of the free usage period.

**Full-Catalog Limited Offering** means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which the features or functionality by which the End User can listen to sound recordings are substantially limited relative to Subscription Offerings in

the marketplace providing unlimited features or functionality (e.g., a product with substantially limited capability to access recordings on-demand), but with a comprehensive catalog of sound recordings.

**GAAP** means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

**Hardware Bundle** means a Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products capable of rendering audio playback comprising Licensed Activity as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) with which it is made available (e.g., a case in which an End User can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price). Royalties shall be calculated on a “Hardware Bundle” basis for two years only, after which the royalty that would apply to the Offering if sold on a standalone basis shall apply.

**Licensee** means any entity availing itself of the compulsory license under [17 U.S.C. 115](#) to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

**Licensed Activity**, as the term is used in ~~subpart B of this part, means delivery of musical works~~ subparts C and D of this part, means covered activity, under voluntary or statutory license, via ~~physical phonorecords and~~ Digital Phonorecord Deliveries in ~~connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with~~ the form of Eligible Interactive Streams, Eligible Limited Downloads, ~~Limited Offerings, mixed Bundles, and Locker Services~~ and Restricted Downloads.

**Limited Offering** means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which –

- (1) An End User cannot choose to listen to a particular sound recording (*i.e.*, the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or
- (2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (e.g., a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

**Locker Service** means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

**Mixed Service Bundle** means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) ~~or non-music products (e.g., a telephone device)~~ of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

**Music Bundle** means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

~~Offering means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.~~

Net Advertising Revenues means, for each Accounting Period, revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States, from advertisements provided by Licensee or a Licensee-approved third party and displayed or streamed on a Relevant Page, less, off the top, applicable taxes, and any carriage or in-app commission fees (such carriage or in-app commission fees subject to a cap equal to 30% of the retail price excluding taxes). Net Advertising Revenue specifically excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any "upsells." Net Advertising Revenues also excludes all Net Subscription Revenues. Net Advertising Revenues shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

**Net Subscription Revenues** means, for each separate Subscription Offering, for each Accounting Period, any revenues recognized by Licensee and its Affiliates, in accordance with GAAP, in the United States from users in consideration for access to the relevant Subscription Offering (including subscription fees from users of such Subscription Offering), less, off the top, applicable taxes, refunds, charge-backs, declined payments, carriage or in-app commission fees or any other fees payable to platform, device or other distribution partners in connection with Subscription Service transactions (such carriage or in-app commission fees subject to a cap equal to 30%, and other fees payable to distribution partners subject to a cap equal to 10%, in each case of the retail price excluding taxes). Net Subscription Revenue for a particular Subscription Offering excludes any Net Advertising Revenues, and Net Subscription Revenues from any other Subscription Offering. Net Subscription Revenues also excludes any e-commerce and referral fees received by Licensee and its Affiliates, including fees for tickets, merchandise and any “upsells.”

**Non-Eligible Work** means a sound recording (including audiovisual recordings) embodying a musical work, the reproduction and distribution of which is not eligible for licensing pursuant to 17 U.S.C. 115, or for which the reproduction and distribution rights have been obtained other than pursuant to the license granted under 17 U.S.C. 115, or for which no reproduction or distribution license is necessary under the Copyright Act, in each instance as included as part of an Offering. Non-Eligible Works excludes in all instances, advertisements, whether audio-only, visual, or audiovisual.

**Offering** means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.

**Paid Locker Service** means a Locker Service for which the End User pays a fee to the Service Provider.

**Performance Royalty** means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

**Permanent Download** has the same meaning as in [17 U.S.C. 115\(e\)\(24\)](#).

**Play** means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user, or is otherwise reasonably determined by Licensee via reproducible methodology to be fraudulent. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

**Promotional Offering** means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to

promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

~~(2) For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;~~

(3) For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of [17 U.S.C. 106\(2\)](#) or [115\(a\)\(2\)](#);

(4) The Promotional Offering is made available to an End User free of any charge; and

(5) The Service Provider provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

***Purchased Content Locker Service*** means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A *qualifying seller* for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or -

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

(2) [Reserved]

**Relevant Page** means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.*, an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

**Restricted Download** means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

**Ringtone** means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

**Service Provider** means that entity governed by [subparts C](#) and [D of this part](#), which might or might not be the Licensee, that with respect to the section 115 license

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

**Service Provider Revenue.** ~~(1) Subject to paragraphs (2) through (5) of this definition means, for each Offering, and subject to GAAP, Service Provider Revenue shall mean:~~

~~(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;~~

for each Accounting Period, the sum of Net Advertising Revenues, if any

~~(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third party “in stream” or “in download” advertising as part of any Offering, i.e., advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and~~

, and

~~(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.~~

~~(2) Service Provider Revenue shall:~~

~~(1) (i) Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and~~

~~(2) (ii) Include the value of any barter or other nonmonetary consideration; and~~

~~(3) (iii) Except as expressly detailed in this part, not be subject to any other deduction or set off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.~~

~~(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.~~

~~(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.~~

~~(5) In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the revenue recognized from End Users for the bundle less the standalone published price for End Users for each of the other~~

~~component(s) of the bundle; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.~~  
Net Subscription Revenues, if any.

**Sound Recording Company** means a person or entity that:

- (1) Is a copyright owner of a sound recording embodying a musical work;
- (2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under [chapter 14 of title 17, United States Code](#), that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;
- (3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or
- (4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

**Standalone Non-Portable Subscription Offering—Streaming Only** means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

**Standalone Non-Portable Subscription Offering—Mixed** means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

**Standalone Portable Subscription Offering** means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, [not including Limited Offerings or Full-Catalog Limited Offerings](#).

[Standalone Free Nonsubscription/Ad-Supported Service](#) means an Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads free of any charge to the End User, [not including Free Trials](#). **Stream** means the digital transmission of a sound recording of a musical work to an End User -

- (1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

***Streaming Cache Reproduction*** means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

***Student Plan*** means a discounted Subscription Offering available on a limited basis to students.

***Subscription Offering*** means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a bundle with one or more other products or services.

~~*Total Cost of Content or TCC* means the total amount expended by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. As used in this definition, “Applicable Consideration” means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.~~

### 3. **§ 385.3 Late payments.**

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in [17 U.S.C. 115\(c\)\(2\)\(I\)](#) or [115\(d\)\(4\)\(A\)\(i\)](#), as applicable and detailed in [part 210 of this title](#). Late fees shall accrue from the due date until the Copyright Owner receives payment.

#### ~~§385.4 Recordkeeping for promotional or free trial non-royalty bearing uses.~~

~~(a) *General.* A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.~~

~~(b) *Retention of records.* A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.~~

~~(c) *Availability of records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.~~

#### **Subpart B - Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles**

### 4. **§ 385.10 Scope.**

This subpart establishes rates and terms of royalty payments for making and distributing [physical phonorecords](#), ~~including by means of Digital Phonorecord Deliveries~~ [Permanent Downloads](#), [Ringtones](#), and [Music Bundles](#), in accordance with the provisions of [17 U.S.C. 115](#).

### 5. **§ 385.11 Royalty rates.**

(a) *Physical phonorecord deliveries and Permanent Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) **Ringtones.** For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) **Music Bundles.** For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under [paragraph \(a\)](#) or [\(b\)](#) of this section, as appropriate.

**Subpart C - Eligible Interactive Streaming, Eligible Limited Downloads, ~~Full-Catalog~~ Limited Offerings, ~~Limited Offerings~~, Mixed Service Bundles, Bundled Subscription Offerings, ~~Hardware Bundles~~, Locker Services, and Other ~~Delivery Configurations~~**

## 6. § 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works ~~through~~ [provided through subscription and nonsubscription digital music Service Providers, including Limited Offerings, Full-Catalog Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, ~~Hardware Bundles~~, Paid Locker Services, and Purchased Content Locker Services](#) ~~provided through subscription and nonsubscription digital music Service Providers~~ in accordance with the provisions of [17 U.S.C. 115](#), exclusive of Offerings subject to [subpart D of this part](#).

## 7. § 385.21 Royalty rates and calculations.

(a) **Applicable royalty.** Licensees that engage in Licensed Activity covered by this subpart pursuant to [17 U.S.C. 115](#) shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in subsection (b) of this subpart, provided, however, that Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part.

(b) **Rate calculation.** Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this ~~paragraph (b).~~ [paragraph \(b\) of this section](#). If a Service Provider includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue and expenses associated with each Offering. For purposes of calculating rates pursuant to this ~~section and all of its subparts,~~ [§ 385.21, \(i\)](#) a Family Plan shall be treated as 1.5 ~~s~~Subscribers per month, prorated in the case of a Family Plan [Subscription](#) in effect for only part of a calendar month ~~and, (ii)~~ a Student Plan shall be treated as 0.50 ~~s~~Subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month ~~, and (iii) an Active Family Bundle shall be treated as 1.5 Active Subscribers per month, prorated in the case of a Family Bundle in effect for only part of a calendar month.~~

(1) **Step 1: Calculate the All-In Royalty for the Offering.** For each Accounting Period, the all-in royalty for ~~all Offerings~~ [each Offering](#) in this subpart (other than [Hardware Bundles and Plays](#) subject to subpart D ~~of this part~~) shall be ~~the greater of (A) the applicable~~ [a headline](#)

percent of revenue rate multiplied by Service Provider Revenue as set forth in in Column A of the table below and (B) the applicable percent of TCC or TCC amount as set forth in Column B of the table: For Paid Locker Services and Purchased Content Locker Services the headline rate shall be 12%.<sup>1</sup>

Offering	Column-A % of Service Provider Revenue	Column-B TCC % or TCC Amount
<i>Standalone Non-Portable Subscription Offering—Streaming Only</i>	10.5 %	The lesser of 22 % of TCC for the Accounting Period or 50 cents per subscriber per month
<i>Standalone Non-Portable Subscription Offering—Mixed</i>	10.5 %	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month
<i>Standalone Portable Subscription Offering</i>	10.5 %	The lesser of 21 % of TCC for the Accounting Period or 80 cents per subscriber per month
<i>Bundled Subscription Offering</i>	10.5 %	21 % of TCC for the Accounting Period
<i>Mixed Service Bundle</i>	11.35%	21% of TCC for the Accounting Period
<i>Limited Offering</i>	10.5%	21% of TCC for the Accounting Period
<i>Paid Locker Service</i>	12%	20.65% of TCC for the Accounting Period
<i>Purchased Content Locker Service</i>	12%	22% of TCC for the Accounting Period
<i>Free nonsubscription/ad-supported services free of any charge to the End User</i>	10.5%	22% of TCC for the Accounting Period

**-(2) Step 2: Subtract Applicable Performance Royalties.** From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for

<sup>1</sup> For other Offerings, Apple understands the Judges are considering the appropriate headline rate during the *Phono III* remand proceeding. Apple proposes adopting that same number here as well, provided it is reasonable under the willing buyer/willing seller standard.

which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of *bona fide* technical limitations as described in step 3 in [paragraph \(b\)\(3\)](#) of this section, using the same alternative methodology as provided in step 4.

(3) **Step 3: Determine the Payable Royalty Pool.** The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in [paragraph \(b\)\(2\)](#) of this section; and

(ii) The royalty floor (if any) set forth in the following table, subject to any adjustments for Family Plans, Student Plans, Active Family Bundles, and Free Trial Offerings. For Offerings subject to an all-in, rather than mechanical, floor, performance royalties should be subtracted from the all-in per-Subscriber pool using the methodology in Step 2 prior to doing this Step 3 determination.

Offering	Mechanical Royalty Floor	All-In Royalty Floor
Standalone Non-Portable Subscription Offering - Streaming Only	15 cents per <del>s</del> Subscriber per month	NA
Standalone Non-Portable Subscription Offering - Mixed	30 cents per <del>s</del> Subscriber per month	NA
Standalone Portable Subscription Offering	50 cents per <del>s</del> Subscriber per month	NA
<del>Limited Offerings</del> <u>Bundled Subscription Offering</u>	NA	<del>25</del> 18 cents per <del>month for</del> each Active Subscriber during that <del>per</del> month
<del>Mixed-Service-Bundle</del> <u>Full-Catalog Limited Offering</u>	<del>n/a</del> 25 cents per Subscriber	NA
<u>Standalone Free Nonsubscription/Ad Supported Services</u>	<del>Limited Offering</del> <u>The royalty floor that would apply to the Offering if it were a Subscription Offering for each Active Subscriber during the month, reduced by the percentage of total listening hours of the applicable Offering comprising advertising during the applicable Accounting Period</u>	<del>n/a</del> NA
<u>Bundled Subscription Offering</u> <del>Paid Locker Service</del>	<del>n/a</del> <u>The royalty floor that would apply to the music component of the bundle if it were offered</u>	NA

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	<a href="#">on a standalone basis for each Active Subscriber during the month</a>	
<del>Purchased Content Locker Service</del> <a href="#">Hardware Bundles</a>	<del>n/a</del> <a href="#">33 cents per Active Subscriber</a>	
<a href="#">Paid Locker Service</a> <del>Free nonsubscription/ad-supported services free of any charge to the End User</del>	<del>n/a</del> <a href="#">NA</a>	<a href="#">17 cents per Subscriber per month</a>

**Computation of royalty floors.** For purposes of this [paragraph \(b\)\(3\)](#), to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to ~~subpart D~~, [a zero royalty rate pursuant to subpart D of this part](#), except in the case of a Bundled Subscription Offering [or Hardware Bundle](#), where subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period.

(4) **Step 4: Calculate the Per-Work Royalty Allocation.** This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in [paragraph \(b\)\(3\)](#) of this section [\(subject to paragraphs \(i\) and \(ii\) of this paragraph\)](#) must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to [subpart D of this part](#)) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to [subpart D of this part](#)) through the Offering during the Accounting Period.

[Prior to conducting the allocation described in this Step 4,](#)

[\(i\) for all Offerings, the payable royalty pool shall be multiplied by the Eligible Work Allocation, and](#)

[\(ii\) for Bundled Subscription Offerings only, after conducting the calculation described in paragraph \(i\) above, the payable royalty pool shall be multiplied by the proportional value of the Offering based on the stand-alone retail price of each product or services in the bundle. For example, if a Service Provider sells the Offering on a stand-alone basis for \\$10.00/month and a separate service on a stand-alone basis for \\$5.00/month, but sells the Offering and other service together as part of a bundle for \\$12.00/month, then the payable royalty pool shall be multiplied by 80%.](#)

For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in [paragraph \(c\)](#) of this section. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of *bona fide* limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) **Overtime adjustment.** For purposes of the calculations in step 4 in this [paragraph \(b\)\(4\)](#) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes - Each Play = 1.2 Plays.

(2) 6:01 to 7:00 minutes - Each Play = 1.4 Plays.

(3) 7:01 to 8:00 minutes - Each Play = 1.6 Plays.

(4) 8:01 to 9:00 minutes - Each Play = 1.8 Plays.

(5) 9:01 to 10:00 minutes - Each Play = 2.0 Plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

[\(c\) Accounting.](#) The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due.

**Subpart D - Promotional and Free-to-the-User Offerings, ~~Free Trial Offerings and Certain Purchased Content Locker Services~~**

## 8. § 385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of [17 U.S.C. 115](#).

## 9. § 385.31 Royalty rates.

(a) **Promotional Offerings.** For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that

the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) ***Free Trial Offerings.***

(1) For Free Trial Offerings ~~for which the Service Provider receives no monetary consideration~~, the royalty rate is zero; ~~for the first 30 days;~~

(2) During the second and third month of any Free Trial Offering, the minima identified in Subpart C, Section (b)(3)(ii) shall be reduced by 50%.

(c) ***Certain Purchased Content Locker Services.*** For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(d) ***Unauthorized use.*** If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress**

**In the Matter of**

**DETERMINATION OF RATES AND  
TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(PHONORECORDS IV)**

**Docket No. 21–CRB–0001–PR  
(2023–2027)**

**DECLARATION AND CERTIFICATION OF MARY MAZZELLO**

1. I represent Apple Inc. (“Apple”) in the above-captioned proceeding. I respectfully submit this declaration and certification in support of Apple’s filing of the following documents, along with all associated exhibits, filed on October 20, 2021 pursuant to Section IV(A) of the Protective Order, dated July 20, 2021: Introductory Memorandum to the Written Direct Statement of Apple, Inc.; Testimony of Elena Segal, and; Written Direct Testimony of Stephen D. Prowse, Ph.D. (together, the “Filings”).

2. I, or personnel working under my supervision, have reviewed the Filings. I also have reviewed the Protective Order.

3. I have determined to the best of my knowledge, information and belief that the documents in the Filings marked “RESTRICTED — Subject to Protective Order in Docket No. 21-CRB-0001-PR (2023-27) (Phonorecords IV)” (the “Restricted Document”) are non-public and would, if disclosed, competitively disadvantage Apple, provide a competitive advantage to another participant in this proceeding, or interfere with Apple’s ability to obtain like information in the future.

4. The Restricted Documents consist of highly sensitive business information and agreements.

5. The Restricted Documents shall be treated as “Restricted” pursuant to the terms of the Protective Order and shall not be disclosed except in accordance with the Protective Order.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: October 20, 2021  
New York, NY

/s/ Mary Mazzello

Mary Mazzello  
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601 Lexington Avenue  
New York, NY 10022  
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*Counsel for Apple Inc.*

# Proof of Delivery

I hereby certify that on Wednesday, October 20, 2021, I provided a true and correct copy of the Apple Vol 1 - Memorandum, Proposed Rates and Confidentiality Declaration to the following:

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at gggreenstein@wsgr.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Signed: /s/ Mary C Mazzello